STATE OF MICHIGAN

IN THE SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN

Plaintiff-Appellant

-vs-

DANE RICHARD KRUKOWSKI

Defendant-Appellee.
_____/

Supreme Court No. 160263

Court of Appeals No. 334320

Lower Court No. 15-41274 FH

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Attorney for Plaintiff-Appellant
_____

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DEFENDANT-APPELLEE'S ANSWER TO PLAINTIFF-APPELLANT'S APPLICATION FOR LEAVE TO APPEAL

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Statement of Jurisdiction

Dane Richard Krukowski accept the Plaintiff-Appellant's Statement of Jurisdiction.

Counter-Statement of Question Presented

I. Did the Court of Appeals correctly conclude there was insufficient evidence to support Mr. Krukowski's second-degree child abuse conviction because the omission at issue is not proscribed by MCL 750.136b(3)?

Court of Appeals answers, "Yes."

Dane Richard Krukowski answers, "Yes."

Counter Statement of Facts

Trial Testimony

Roegan Krukowski was born December 6, 2014 to parents Codie Stevens and Dane Krukowski. (T 5/4/16 34). Ms. Stevens worked at a pharmacy, and Mr. Krukowski worked at bar and grill as a cook, bouncer and bartender. (T 5/4/16 74). Because the couple's first child was delivered by cesarean section, Roegan was also scheduled to be delivered by cesarean section, on December 18. However, Ms. Stevens went into labor on December 6, and went to the hospital. (T 5/4/16 147). The delivery was a difficult one. Ms. Stevens endured near constant vomiting during labor. (T 5/4/16 35). Rather than take her immediately, the procedure was repeatedly delayed while other patients went first. (T 5/4/16 36). Ultimately Ms. Stevens labored for 19 hours. (T 5/4/16 34)

When Ms. Stevens was finally able to hold Roegan, he was bruised from forehead to mid-chest. (T 5/4/16 38). When his grandmother, Shawn Stevens, first saw Roegan, she first noticed "His head was huge. . . . His head was very big." (T 4/28/16 236-237). His grandmother also remarked on the bruising. (T 4/28/16 239). Shawn Stevens asked hospital staff for Roegan to be x-rayed because she was concerned about the bruising and enlarged head, but she was ignored. (T 4/28/16 240).

Roegan couldn't hold down formula or breastmilk. (T 5/4/16 38). He continued to have problems keeping his formula down, and Ms. Stevens and Mr. Krukowski tried several types before they found one he seemed to tolerate. (T 5/4/16 39). They

were discharged from the hospital on December 9, and went to see pediatrician Dr. Dawis on December 11. (T 5/4/16 39).

Ms. Stevens told Dr. Dawis Roegan was not keeping his formula down, and that he was generally unhappy. (T 5/4/16 40). Roegan cried with great distress, and could only be comforted for short periods of time. (T 5/4/16 40-41). He continued to vomit. (T 5/4/16 41). Dr. Dawis remarked Roegan was a bit jaundiced, but only suggested he should get sunlight and plenty to eat. (T 5/4/16 44). Dr. Dawis concluded Roegan was a well baby in all respects, including his head. (T 4/28/16 21). A return visit was scheduled for February 9, 2015. (T 5/4/16 45). Between the visits, Roegan became less fussy and "not too overbearing," by Ms. Stevens's account. (T 5/4/16 45).

February 7 was a Saturday and Ms. Stevens was home along with Mr. Krukowski, Roegan and the couple's older child, Ella. (T 5/4/16 49). Mr. Krukowski often bathed Roegan, and he decided to give him a bath that day. (T 5/4/16 162). While Mr. Krukowski was taking him out of the tub, Roegan jerked, slipped from Mr. Krukowski's grasp and fell. (T 5/4/16 50, 165). Roegan hit his head and fell into the water, and Mr. Krukowski scooped him out and called to Ms. Stevens. (T 5/4/16 166). Ms. Stevens dried him, dressed him, and checked him over. (T 5/4/16 50). Ms. Stevens checked to see if Roegan's eyes would follow her finger, and he did. (T 5/4/16 50, 172). She checked to see if Roegan would grasp her finger, and he did. (T 5/4/16 50, 172). She also checked his feet for reaction, and he responded. (T 5/4/16 50, 172).

Ms. Stevens noticed "slight swelling, and then a – I think it was like a tiny little dot, and it was, like, yellow. It wasn't like, black or blue" on Roegan's head. (T 5/4/16 51). Mr. Krukowski thought "it just looked a little red from where, you know, I had dropped him." (T 5/4/16 168). Mr. Krukowski said a "dime-sized" bruise developed. (T 5/4/16 170). Shawn Stevens, Codie Stevens mother, saw Roegan that day and said he had a "dime-sized bump," with only a slight shadowing in terms of discolorization. (T 4/28/16 221). Shawn Stevens advised the couple she would take Roegan to be seen by a doctor, but didn't specify her opinion as to a need for it to be done immediately. (T 4/28/16 222). Shawn Stevens also explained her rationale as "my suggestion is I would – just to be safe than sorry, I would take him in." (T 4/28/16 223). She went on, "I suggested to her. But to me, you know, to be safe than sorry; not that I felt he was in danger, because the bump on his head was not hardly there. It was so miniscule. Parental discretion." (T 4/29/16 102-103). They wrapped a small bag of frozen peas in a towel and put it on his head. (T 5/4/16 75). On Sunday, February 8, Roegan was awake and smiling. There was nothing abnormal about his breathing or behavior. (T 5/4/16 76). He ate regularly. (T 5/4/16 76). Mr. Krukowski set up a little next of blankets and stuffed animals and Roegan and his sister Ella cuddled and watched cartoons. (T 5/4/16 52).

On Monday, February 9, Ms. Stevens took Roegan back to the pediatrician for the regularly scheduled follow-up. (T 5/4/16 52). Ms. Stevens informed the doctor that Roegan was still somewhat fussy, that he was better about keeping formula

down, and about the tub fall.[1] (T 5/4/16 53). Dr. Dawis recommended taking Roegan to a chiropractor, and Ms. Stevens was skeptical but made an appointment for that day. (T 5/4/16 53-55).

Roegan had appointments with a chiropractor on February 9th, 10th, and 18th. (T 5/4/16 48-49). On February 9, Dr. Dense saw Roegan. (T 5/4/16 55). No x-rays were taken, but Dr. Dense put Roegan between his legs and adjusted his neck. (T 5/4/16 55). Ms. Stevens reported a cracking sound, like when a person cracks their fingers. (T 5/4/16 55). Dr. Dense then hung Roegan upside down and "twisted", and "proceeded to lay him on the medical bed, and his neck went from left to right and it cracked." (T 5/4/16 56; 4/28/16 122). Ms. Stevens brought Roegan back the next day, and he was seen by Dr. Barrigar. (T 5/4/16 57). Dr. Barrigar did the same things, cracking Roegan's neck and hanging him upside down. (T 5/4/16 57; 4/28/159). Ms. Stevens was still skeptical, but she said "I didn't say anything. Putting my trust into a doctor." (T 5/4/16 57). Ms. Stevens brought Roegan back to see Dr. Barrigar on February 18, and the treatment was the same. (T 5/4/16 58). Ms. Stevens also took Roegan with her to get formula from WIC two or three times, and each time they measured his head and weighed him. (T 5/4/16 97).

From February 19 to 21, Roegan behaved normally, according to Ms. Stevens. (T 5/4/16 59). On the February 21, Roegan vomited after a bottle, but Ms. Stevens first thought was that the flu might be the cause. (T 5/4/16 59). She worked at a pharmacy and people told her it had been going around. (T 5/4/16 59). Roegan

[1] Dr. Dawis denied being informed of the tub fall. (T 4/28/16 27).

continued to vomit that afternoon, so Ms. Stevens made him a bottle of peppermint water and he kept that down. (T 5/4/16 59-60). Roegan took and tolerated another bottle of peppermint water before going to bed and sleeping through the night. (T 5/4/16 60). Dr. Dawis had recommended peppermint water for Ella when she was a baby. It worked then, and Ms. Stevens followed the advice again. (T 5/4/16 79).

Sunday morning, February 22, Ms. Stevens heard Roegan whimpering at about 8:30 or 9 a.m. (T 5/4/16 62). She went to check on him, and his arm was twitching. (T 5/4/16 62). Ms. Stevens woke up Mr. Krukowski and he held Roegan for a bit. (T 5/4/16 63, 176). Roegan smiled and Ms. Stevens started to run some bath water. (T 5/4/16 63, 176). Then, the twitching continued and they decided to take Roegan to the hospital. (T 5/4/16 63, 176). Ms. Stevens told hospital staff she thought Roegan was having seizures and they took him back right away. (T 5/4/16 88). It was 7 to 10 minutes from when they noticed twitching until they left for the hospital. (T 5/4/16 172). At that point Roegan did not have any outward signs of trauma to his head, or to his chest or abdomen. (T 5/4/16 95). He didn't have any bruises or abrasions. (T 5/4/16 95). Roegan's eyes appeared fine. (T 5/4/16 178).

Covenant Hospital nurse Sara Markle agreed that there were no signs of trauma when Roegan was admitted. (T 4/27/16 191). When Roegan arrived, his heart rate and respiratory rate were normal. (T 4/27/16 201). Roegan's temperature was also normal. (T 4/27/16 202).

Hospital staff administered Ativan intravenously to stop the seizures. (T 5/4/16 64). During that procedure, Ms. Stevens and Mr. Krukowski saw staff bend

Roegan's hand back dramatically to insert the IV needle. (T 5/4/16 89, 181). Then Roegan's heart rate dropped dramatically. (T 5/4/16 91). Roegan had a "glazed" look in his eyes. (T 5/4/16 91). Shortly after that Mr. Krukowski left to take Ella to Ms. Stevens's mother's house so she wouldn't have to be at the hospital. (T 5/4/16 65).

Emergency Room doctor Jessica Kiry agreed there were no obvious signs of trauma when Roegan was admitted. (T 4/28/16 58-59). She said Roegan had "no abrasions, no bruising, no obvious signs of external trauma, at the time of the exam." (T 4/28/17 59). Roegan's temperature was normal, (T 4/28/17 77) heart rate normal was and there were no visible signs of distress such as chest pounding, (T 4/28/17 77) respiration was normal (T 4/28/17 78), and he was fully oxygenated. (T 4/28/17 78). Dr. Kiry said there was nothing in the white part of the eye that would indicate trauma. (T 4/28/17 80). Roegan's neck was normal, (T 4/28/17 81) and chest sounds fine. (T 4/28/17 81). He did not have a distension in abdomen, (T 4/28/17 81) or coughing or choking. (T 4/28/17 81-82).

Because of Roegan's seizures, Dr. Kiry suspected low sodium or electrolyte abnormality. (T 4/28/17 59). She ordered lab tests which ruled this out, so suspected trauma or bleeding in the brain and ordered a CT and an MRI. (T 4/28/17 60-63). Those tests revealed bleeding, and Dr. Kiry suspected non-accidental trauma. (T 4/28/17 65, 67-68).

Ms. Stevens stayed with Roegan while he was given and MRI. (T 5/4/16 67). Shortly thereafter, they took Roegan for x-rays, detectives arrived and separated Ms. Stevens and Mr. Krukowski for interrogation. (T 5/4/16 67-68).

Dr. Gerard Farrar, a radiologist, testified he read Roegan's MRIs. (T 4/28/16 97). Dr. Farrar saw a subdural hygroma, evidence of an old bleed, and acute blood, evidence of a more recent bleed. (T 4/28/16 98-99). Dr. Farrar testified the old bleed might be a couple of weeks old, and the new bleed a day or two old. (T 4/28/16 100). Dr. Farrar testified the injuries could have been caused by a bathtub fall, or by being shaken. (T 4/28/16 105-106).

Ophthalmologist Dr. Majed Sahouri testified he used a RetCam on Roegan to look through his pupil and see the back of the eye. (T 4/27/16 215). Dr. Sahouri observed numerous hemorrhages in the back of Roegan's eyes. Based the RetCam views, Dr. Sahouri testified "Hemorrhages of this severity usually – I would characterize as non-accident." (T 4/27/16 220). Dr. Sahouri testified hemorrhages of this kind were cause by "shaking," and could not be caused by blunt force trauma. (T 4/27/16 220).

Dr. Frank Schinco is a neurological surgeon who also treated Roegan. (T 4/29/16 134). Dr. Schinco would opine at trial that with the combination of hematomas and retinal hemorrhages, "it would indicate a very significant probability and likelihood that the child had been shaken in a typical manner. When you see retinal hemorrhages of that type, what we see, subdural hemorrhages or – that are of different ages, that is highly diagnostic of shaken baby syndrome." (T 4/29/16 139). Dr. Schinco ultimately inserted a catheter into Roegan's skull to relieve pressure on the brain. (T 4/29/16 146). Dr. Schinco would testify the catheter drained 10 ounces of fluid from Roegan's skull. (T 4/29/16 148).

Dr. Kristin Constantino, a radiologist, interpreted Roegan's skeletal survey, a series of x-rays of every bone in the body. (T 4/28/16 179). The x-rays were taken March 1. (T 4/28/16 200). The survey was not done as a part of Roegan's initial treatment, but triggered because of suspected non-accidental trauma. (T 4/28/16 180). Dr. Constantino found evidence of a facture in Roegan's skull, (T 4/28/16 184) a fracture in his forearm (T 4/28/16 192) and healing fractures in his ribs (T 4/28/16 197-198). Dr. Constantino concluded the skull fracture could have been caused by a bathtub fall. (T 4/28/16 214-215). Dr. Michael Fiore specializes in pediatric critical-care and he treated Roegan at the hospital. Regarding the interaction of the skull fracture and swelling in Roegan's brain, Dr. Fiore said "the skull gets fracture, and it's like a crack, and the swelling of the brain causes that crack to split open." (T 4/29/16 57-58).

Although Roegan's stay at the hospital was a difficult one, he fully recovered. Roegan was discharged March 3, 2015. (T 4/29/16 45). Although Roegan continues to do well, when he was re-evaluated four months after discharged, there was evidence of yet another hemorrhage which occurred while he was in foster care.

Charges of child abuse were filed against Mr. Krukowski and Ms. Stevens, and a preliminary examination was held May 5, 2015, and both were bound over. (T 5/5/15 74). On July 6, 2015, trial counsel moved for appointment of a neurologist and an ob-gyn specialist. (T 7/6/15 5). Trial counsel explained they required the experts to consult regarding the implications of the bathtub fall, as well as the implication of the complicated child birth. (T 7/6/15 5). Trial counsel also noted the

Michigan Supreme Court's then-recent opinion in *People v Ackley*, 497 Mich 381 (2015), which was decided just a week before. (T 7/6/15 6). The prosecution said "[a]lthough I'm ready for trial, I don't want to try this case unnecessarily if there's going to be a claim later that they were ineffective for – for seeking it. So think you should consider [the motion for appointment of an expert]." (T 7/6/15 9). The Circuit Court found there was a basis for an expert to review Roegan's medical records, and that there might be a basis for an expert to review the records regarding the birth as well. (T 7/6/15 13). The court authorized $1,000.00 and told counsel it might authorize more if it was needed. (T 7/6/15 14).

On November 10, 2015, trial counsel again asked for funding for an expert to review the birth records. (T 11/10/15 14). The Circuit Court noted funds had already been provided, and trial counsel said "I think you said we could employ an expert that was done through the family court, and kind of use that doctor." (T 11/10/15 14) The court said:

> The previous stipulation and order was to secure all medical records; as well as the medical expert on behalf of the defendant, to review the medical records and reports. So I – I don't understand why that hasn't been done by now. [(T 11/10/15 15)]

The prosecution responded that was done by Dr. Guertin, who was employed in the family court termination of parental rights case. (T 11/10/15 15). Trial counsel said an expert was "not very easy to find, in light of this being a local doctor," and the court advised "Well, I think you've got to go non-local, I would think." (T 11/10/15 16). Trial counsel expressed approval to use Dr. Guertin as his independent medical

examiner. (T 11/10/15 16). The court asked for an additional motion, if further consultation was required. (T 11/10/15 17)

On February 1, 2016, the Circuit Court noted that no motion had been made for additional funds for an expert. (T 11/10/15 14). The court said it would adjourn trial and entertain such a motion. (T 11/10/15 14). Trial counsel said he did not plan to call any expert witnesses. (T 11/10/15 14). The prosecution offered a plea agreement, and the Circuit Court offered a *Cobbs* evaluation. The prosecution agreed to a reduced charge of attempted second degree child abuse, and a no-contest plea in return for dismissal of the original charges. (T 11/10/15 8). The Court advised it expected to sentence probation with no incarceration under that deal. (T 11/10/15 8). Mr. Krukowski rejected the offer. (T 11/10/15 10).

Prosecution's Theory of the Case

Trial began on April 27, 2016 and the prosecution opened by saying it would not prove Mr. Krukowski or Ms. Stevens had intentionally harmed Roegan:

> What will not be proven, in this case . . . we will not prove that the skull fracture or a particular broken arm or rib or a particular brain bleed or the resulting fluid buildup from that bleed or a particular retinal hemorrhage in one or the other of the eyes was specifically caused by her or him.
>
> If the evidence, in this case, could show an intentional act by one or both of them, the criminal charge would be a higher degree.
>
> . . .
>
> What will be proven, in this case, however, is that no matter how these injuries occurred, they – they, as parents – failed or mitted to provide the necessary medical treatment in a timely way that would alleviate this child's pain and suffering, prevent worsening of the symptoms in these injuries, and minimize the very real possibility the

> baby could have died of those injuries, imminently, they finally took the baby, on the 22nd. [(T 4/27/16 175)]

In closing, the prosecution encouraged the jury to "visualize" Mr. Krukowski shaking Roegan:

> Are you now, or during this trial as you heard evidence from the doctors and nurses, or anyone else, trying to visualize did Dane grab that baby and shake that baby? Did Dane cuff that baby? Instead of it slipping out of his arms, did he get angry because that baby squealed like it did all the time when it came from the warm water into the cold and he just had enough? . . . Did he do something in one or two seconds, or a half a second?
>
> . . .
>
> But that's not the burden of proof in this case. We don't have to prove beyond a reasonable doubt that either of them, and for your benefit, Dane, because you're his jury, did he do that? Even though the doctors said this is not accidental. This baby was abused. This is nonaccidental. This is child abuse. [(T 5/5/16 66-67)]

The jury found Mr. Krukowski guilty of second-degree child abuse. (T 5/6/16 3). Ms. Stevens jury also found her guilty of second-degree child abuse. (T 5/5/16 157). Mr. Krukowski was sentenced to 3 to 10 years in prison. (T 6/14/16 26).

Court of Appeals Opinion

On August 1, 2019, the Court of Appeals vacated Mr. Krukowski's convictions and sentence because Mr. Krukowski's alleged failure to seek medical attention for Roegan, an omission, was not proscribed by the second-degree child abuse statute. (Appendix A – Court of Appeals Opinion).

I. The Court of Appeals correctly concluded there was insufficient evidence to support Mr. Krukowski's second-degree child abuse conviction because the omission at issue is not proscribed by MCL 750.136b(3).

Issue Preservation

An insufficient-evidence claim is reviewable on appeal even when not raised below. *People v Wright*, 44 Mich App 111, 114 (1972).

Standard of Review

An appellate court reviews insufficient-evidence claims de novo to determine whether a rational trier of fact could have found that the defendant's guilt was proven beyond a reasonable doubt. *Jackson v Virginia*, 443 US 307; 99 S Ct 2781; 61 L Ed 2d 560 (1980); *People v Wolfe*, 440 Mich 508, 515 (1992); *People v Hampton*, 407 Mich 354, 368 (1979). Evidentiary conflicts are to be resolved by viewing the evidence in the light most favorable to the prosecution. *Wolfe*, 440 Mich at 515.

Due process requires a verdict to be supported by legally sufficient evidence for each element of the crime. US Const Am XIV; Const 1963, art 1, § 17; *In re Winship*, 397 US 358 (1970); *Jackson*, 443 US at 307. "[T]he Due Process Clause of the Fourteenth Amendment protects a defendant in a criminal case against conviction 'except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.'" *People v Patterson*, 428 Mich 502, 525 (1987) (quoting *Winship*, supra).

The interpretation and application of statutes is a question of law and is reviewed de novo. *People v Babcock*, 469 Mich 247, 666 NW 2d 231 (2003). A court's primary purpose in construing a statute is to ascertain and give effect to the

Legislature's intent. *People v Williams,* 475 Mich 245, 250; 716 NW2d 208 (2006). The most relevant starting point for discerning legislative intent lies in the plain language of the statute. *Id.* "When the language of a statute is clear, it is presumed that the Legislature intended the meaning expressed therein." *Frank v Linkner*, 500 Mich 133; 894 NW2d 574, 580 (2017) (citations and quotation marks omitted). If the Legislature uses clear and unambiguous language, courts must enforce the statute as written. *People v Barbee,* 470 Mich 283; 681 NW2d 348 (2004).

A. There is insufficient evidence to support Mr. Krukowski's conviction for second-degree child abuse because the alleged omission of failing to seek medical treatment is outside the scope of the plain language of the child abuse statute.

Mr. Krukoski was convicted of second-degree child abuse based on the theory he failed to This omission is insufficient to sustain his conviction for second-degree child abuse statute because MCL 750.136b(3)(a) because the only statute only proscribes willful failures "to provide food, clothing, or shelter necessary for a child's welfare or willful abandonment of a child." MCL 750.136b(1)(c).

The second degree child abuse statute, MCL 750.136b(3), has three subsections. Each section criminalizes different forms of child abuse. A person may be convicted of second-degree child abuse if any of the following circumstances apply:

> (a) The person's omission causes serious physical harm or serious mental harm to a child or if the person's reckless act causes serious physical harm or serious mental harm to a child.
>
> (b) The person knowingly or intentionally commits an act likely to cause serious physical or mental harm to a child regardless of whether harm results.

> (c) The person knowingly or intentionally commits an act that is cruel to a child regardless of whether harm results.

Mr. Krukowski was charged with violating MCL 750.136b(3)(a). As described above, to violate this statute, an individual must either (1) commit an omission as defined by MCL 750.136b(1)(c) that causes serious physical or mental harm to a child; or (2) commit a reckless act that causes serious physical or mental harm to a child. The prosecution primarily relied on an omission theory at trial and only relied on the reckless act provision as an alternative theory.

Here, the prosecution's theory at trial was premised upon Mr. Krukowski's failure to take action and provide medical treatment for his child. In other words, the prosecution was based on an omission. Indeed, in their opening statement, the prosecution conceded they would not be able to prove any intentional act by Mr. Krukowski. Instead, they argued it was his failure "to provide the necessary medical treatment in a timely way" that established his guilt under MCL 750.136b(3)(a):

> What will not be proven, in this case . . . we will not prove that the skull fracture or a particular broken arm or rib or a particular brain bleed or the resulting fluid buildup from that bleed or a particular retinal hemorrhage in one or the other of the eyes was specifically caused by her or him.
>
> If the evidence, in this case, could show an intentional act by one or both of them, the criminal charge would be a higher degree.
>
> . . .
>
> What will be proven, in this case, however, is that no matter how these injuries occurred, they – they, as parents – failed or omitted to provide the necessary medical treatment in a timely way that would alleviate this child's pain and suffering, prevent worsening of the symptoms in these injuries, and minimize the very real possibility the

> baby could have died of those injuries, imminently, they finally took the baby, on the 22nd. [(T 4/27/16 175)]

This theory, and the evidence presented to support it, is simply insufficient to support Mr. Krukowski's conviction for second-degree child abuse because, as stated above, a failure to provide medical treatment is not covered under the definition of omission in MCL 750.136b(1)(c).

B. The evidence is insufficient to establish Mr. Krukowski committed a reckless act because the failure to seek medical treatment for a child is an omission, not an act.

In addition to failing to present evidence of an omission covered by the second-degree child abuse statute, the evidence is also insufficient to establish Mr. Krukowski committed a reckless act for purposes of MCL 750.136b(3)(a). This is so because failing to take action is, by definition, an omission.

Black's Law Dictionary (10th ed) provides the following definition of omission:

> 1. A failure to do something; esp., a neglect of duty <the complaint alleged that the driver had committed various negligent acts and omissions>. 2. The act of leaving something out <the contractor's omission of the sales price rendered the contract void>. 3. The state of having been left out or of not having been done <his omission from the roster caused no harm>. 4. Something that is left out, left undone, or otherwise neglected <the many omissions from the list were unintentional>.

This definition falls directly in line with the prosecution's theory at trial – that Mr. Krukowski failed to perform or neglected his duty as a parent when he failed to seek medical treatment for his child. His conduct (or lack thereof) is more accurately described as an omission.

The Court of Appeals recently addressed a similar issue in *People v Murphy*, 321 Mich App 355 (2017). In *Murphy*, the Court of Appeals addressed the issue of

whether there was sufficient evidence to sustain Kimberly Murphy's conviction for second degree child abuse where it was the prosecution's theory that Ms. Murphy committed an act when her child died of ingesting morphine and the evidence showed the home was in a filthy condition, prescription morphine pills were in the home, and she failed to clean to ensure the morphine pills were removed. *Id*. at 357-358.

This Court concluded the evidence was insufficient because Ms. Murphy did not commit an act by failing to protect her child or provide a safe home environment. The Court explained "[s]imply failing to take action does not constitute an act." *Murphy*, therefore, provides published authority for the proposition that "failing to take action does not constitute an act." *Id*. at 360-361.

Murphy provides published support for the proposition that a failure to seek medical care for a child is an omission, not an act. This is precisely at issue in Mr. Krukowski's appeal because the prosecution argued his conviction for second degree child abuse should be sustained under a reckless act theory due to Mr. Krukowski's failure to seek medical attention for his child. *Murphy* provides the only binding authority on this issue. The Court of Appeals correctly applied this precedent and the plain language of the second-degree child abuse statute when it held the evidence was insufficient to support Mr. Krukowski's conviction. This Court, therefore, should deny the prosecution's application for leave to appeal.

Summary and Request for Relief

WHEREFORE, for the foregoing reasons, Defendant-Appellant asks that this Honorable Court deny the prosecution's application for leave to appeal.

Respectfully submitted,

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